
In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WELLS FARGO BANK, Formerly WELLS FARGO BANK
AMERICAN TRUST CO., ETC., APPELLEE

On Appeal from the Judgment of the United States District
Court for the Northern District of California

BRIEF FOR THE APPELLANT

RICHARD C. PUGH,
Acting Assistant Attorney General.

LEE A. JACKSON,
DAVID O. WALTER,
LOUIS M. KAUDER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

Of Counsel:

CECIL F. POOLE,
United States Attorney.

FILED

JUL 2 1937

WM. F. LUCK, CLERK

57

I N D E X

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and Regulations involved	2
Statement	2
Specification of Errors Relied Upon	4
Summary of argument	5
Argument:	
Taxpayer's claim for refund was filed beyond the time established by regulation for the filing of such claims, thus depriving the District Court of jurisdiction to entertain this refund suit	6
Conclusion	17
Appendix A	18
Appendix B	22

C I T A T I O N S

Cases:

<i>Bohnen v. Harrison</i> , 232 F. 2d 406	9
<i>Boswell, J. G., Co. v. Commissioner</i> , 302 F. 2d 682, certiorari denied, 371 U.S. 860	7
<i>Cammarano v. United States</i> , 358 U.S. 498	7
<i>Cleveland v. Higgins</i> , 148 F. 2d 722	14
<i>Douglas v. Commissioner</i> , 322 U.S. 275	7
<i>Duncan v. United States</i> , 148 F. Supp. 264	16
<i>Frank v. Granger</i> , 145 F. Supp. 370	10
<i>Magruder v. Safe Deposit and Trust Co.</i> , 159 F. 2d 913	14
<i>Martin v. Broderick</i> , 177 F. 2d 886	14, 15
<i>Noland v. Westover</i> , 172 F. 2d 614, certiorari de- nied, 337 U.S. 938	16

II

Cases—Continued

	Page
<i>Nutt v. Commissioner</i> , 351 F. 2d 452, certiorari denied, 384 U.S. 918	7
<i>Rogan v. Ferry</i> , 154 F. 2d 974	16
<i>Rogan v. Taylor</i> , 136 F. 2d 598	13
<i>Tucker v. Alexander</i> , 275 U.S. 228	13
<i>United States v. Garbutt Oil Co.</i> , 302 U.S. 528	13
<i>United States v. Kales</i> , 314 U.S. 186	13
<i>Van Dyke v. Kahl</i> , 171 F. 2d 187	14

Statutes:

Internal Revenue Code of 1939:

Sec. 812 (26 U.S.C. 1952 ed., Sec. 812)	8
Sec. 910 (26 U.S.C. 1952 ed., Sec. 910)	8, 18
Sec. 3791 (26 U.S.C. 1952 ed., Sec. 3791)	18

Internal Revenue Code of 1954:

Sec. 2014 (26 U.S.C. 1964 ed., Sec. 2014)	12
Sec. 2015 (26 U.S.C. 1964 ed., Sec. 2015)	12
Sec. 6081 (26 U.S.C. 1964 ed., Sec. 6081)	7, 19
Sec. 7422 (26 U.S.C. 1964 ed., Sec. 7422)	7, 19
Sec. 7851 (26 U.S.C. 1964 ed., Sec. 7851)	8

Miscellaneous:

T. D. 5596, 1948-1 Cum. Bull. 127	9, 14
Treasury Regulations 105, Sec. 81.34	7, 9, 20
Treasury Regulations on Estate Tax, Sec. 20.2053-3 (26 C.F.R., Sec. 20.2053-3)	7, 21

**In the United States Court of Appeals
for the Ninth Circuit**

No. 21,620

UNITED STATES OF AMERICA, APPELLANT

v.

WELLS FARGO BANK, Formerly WELLS FARGO BANK
AMERICAN TRUST CO., ETC., APPELLEE

On Appeal from the Judgment of the United States District
Court for the Northern District of California

BRIEF FOR THE APPELLANT

OPINION BELOW

The findings of fact and conclusion of law of the court below (R. 94-98)¹ are not officially reported.

JURISDICTION

This case involves the federal estate tax liability of the estate of Augusta W. Lachmund. The date of

¹ "R." references are to the single volume of the record on appeal.

death was February 28, 1954. The jurisdiction of the District Court to hear this refund suit is contested by the United States, appellant herein, as set forth more fully *infra*. The District Court's final judgment was entered on September 23, 1966. (R. 99-100.) Within sixty days thereafter the United States filed its timely notice of appeal on November 21, 1966. (R. 102.) This Court's jurisdiction to entertain this appeal is conferred by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Did the District Court err in holding that the right of the estate to claim a refund based upon the deduction of attorney's fees incurred in prior tax refund litigation was not barred by the estate's failure to make the claim within the time required by Treasury Regulations 105 (1939 Code), Section 81.34, and Section 910 of the Internal Revenue Code of 1939?

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in Appendix A, *infra*.

STATEMENT

A federal estate tax return was filed on behalf of the estate of Augusta W. Lachmund on May 19, 1955. The Commissioner of Internal Revenue proposed a deficiency based upon his conclusion that a trust created by the decedent several years prior to her death had been established in contemplation of

death. The estate paid the proposed deficiency in full on February 25, 1957, and filed a claim for refund on May 16, 1957, which was subsequently denied. (R. 95.)

The estate filed a refund suit in the District Court for the Northern District of California on March 21, 1958. (R. 96.) Its complaint made no reference to a deduction for attorneys' fees incurred in connection with the claim or the suit. (R. 109-113.) Following a full trial, judgment for the estate was entered on September 8, 1959, and the refund was paid in full by the United States on April 26, 1960. (R. 96.)

On June 15, 1960, the estate sought authorization in state probate proceedings for the payment of attorneys' fees incurred in the course of the tax refund litigation. On June 30, 1960, the probate court entered its order authorizing the payment of \$9,321.63 (exactly 25% of \$37,286.51, the amount paid by the United States in satisfaction of the judgment in the refund suit) in attorneys' fees, \$750 in executor's fees and \$128.65 for miscellaneous costs, all in connection with the refund litigation. On July 6, 1960, those amounts were paid by the estate's executor. (R. 96-97.)

On May 1, 1961, the estate filed the present claim for refund in the amount of \$3,098.49 based upon an asserted deduction of \$10,950.28 for attorneys' fees arising from the prior and present refund claims. The Commissioner of Internal Revenue determined that the present claim was not timely filed within the period provided by law and denied it. (R. 97.) The

present refund suit, based upon the Commissioner's denial of the latter claim, was filed on February 4, 1965. (R. 1, 97.) The Government's motion to dismiss the suit on the ground that the claim had not been made within the time provided by law was denied on August 23, 1965. (R. 13-14, 44-45.)

Following a trial held on August 19, 1966, the District Court entered findings of fact and conclusions of law on September 18, 1966, in which it held that the estate's claim for a deduction based on attorneys' fees had been timely filed. (R. 94-98.) Judgment for the plaintiff was entered on September 23, 1966 (R. 99), and the United States has appealed. (R. 102.)

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in failing to conclude that the estate's right to claim a deduction for attorneys' fees incurred in refund litigation was barred upon the failure of the estate to make the claim in accordance with the terms of Treasury Regulations 105, Section 81.34 (1939 Code), and Section 910 of the Internal Revenue Code of 1939.

2. The District Court erred in concluding that the estate's right to claim a tax refund based on attorneys' fees involved in refund litigation did not arise until the State probate court authorized payment of the fees after the conclusion of the refund litigation.

SUMMARY OF ARGUMENT

The filing of a timely claim for refund is a jurisdictional prerequisite for maintaining a tax refund suit in Federal District Court. In the present case a refund was sought based upon an estate tax deduction for attorneys' fees incurred in earlier refund litigation. Under the pertinent Regulations, a refund based upon this category of expenses need not be formally filed with the Commissioner so long as it is asserted in pleadings during the course of the substantive refund litigation. The present taxpayer, however, filed its claim for refund one year after termination of the refund proceedings out of which the legal expenses arose and six years after payment of the tax against which the refund was sought. Independently of the regulation applicable to this category of claims, the statute of limitations requires that refund claims be filed within three years following payment of the tax against which the refund is sought. Thus, taxpayer's claim was not made within the time prescribed by the regulation nor was it made within the time prescribed by the statute of limitations without regard to the regulation.

The District Court reached its conclusion that the claim was not barred by the statute of limitations upon the assumption that the taxpayer had no right to claim the refund for attorneys' fees until the amount of the fees was made known and allowed in probate proceedings following termination of the refund litigation. This assumption is without legal basis. The Regulations clearly permit, and indeed re-

quire, the assertion of a refund claim based upon estimated legal expenses prior to or during the substantive refund proceedings to which they relate. The District Court, however, chose entirely to ignore the regulation and its relevance to taxpayer's claim.

It is only by reference to the regulation that taxpayer's claim may be seen as surviving the three-year limitations period following payment of the tax in May, 1955. Within that period, however, taxpayer filed its substantive refund claim to which the present claim is ancillary. The regulation regarding claims for attorneys' fees has the effect of implying an inchoate claim based on a deduction for such fees upon the filing of the substantive claim, but once the substantive claim is resolved, the ancillary claim expires in the absence of formal notice in pleadings or otherwise from the taxpayer asserting its right to claim the ancillary deduction.

ARGUMENT

Taxpayer's Claim for Refund Was Filed Beyond the Time Established by Regulation for the Filing of Such Claims, Thus Depriving the District Court of Jurisdiction to Entertain This Refund Suit

The single question in this case is whether taxpayer's claim for refund was properly denied because of taxpayer's failure to comply with the terms of Treasury Regulations 105, Section 81.34 (1939 Code) (Appendix A, *infra*), regarding the filing of claims based upon deductions for attorneys' fees incurred in prosecuting claims for refund of estate taxes. Fail-

ure to comply with valid conditions for filing a refund claim is an absolute bar to the maintenance of a suit for refund based upon the claim. Section 7422(a) of the Internal Revenue Code of 1954 (Appendix A, *infra*) provides in part that "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Secretary or his delegate, *according to the provisions of law in that regard.*" (Emphasis added.) Regulations prescribing the "time for filing any return, declaration, statement, or other document" are expressly authorized by Section 6081(a) of the 1954 Code (Appendix A, *infra*), and were also authorized by the less specific but no less comprehensive rule-making authority conferred by Section 3791(a) of the 1939 Code (Appendix A, *infra*). Valid Regulations, not inconsistent with the Code, acquire the force and effect of law. See *Douglas v. Commissioner*, 322 U.S. 275 (1944).² Thus a valid regulation which sets forth a condition of time for

² This is especially true of Regulations in effect prior to a reenactment of a revenue statute and which are not modified or disapproved of in the course of reenactment. *Cammarano v. United States*, 358 U.S. 498 (1959); *J. G. Boswell Co. v. Commissioner*, 302 F. 2d 682 (C.A. 9th 1962), certiorari denied, 371 U.S. 860; *Nutt v. Commissioner*, 351 F. 2d 452 (C.A. 9th 1965), certiorari denied, 384 U.S. 918. Section 81.34 of Treasury Regulations 105 (1939 Code), appears (with additions) as Section 20.2053-3(c) (2) of the Regulations under the 1954 Code (Appendix A, *infra*).

the filing of a particular class of refund claims is a provision of law within the meaning of Section 7422 of the 1954 Code and compliance with such a condition is a statutory prerequisite to maintaining a refund suit based upon the claim.

The present taxpayer incurred legal fees in connection with successfully contesting a tax deficiency based upon the Commissioner's assertion that a gift of the decedent had been made in contemplation of death. The decedent having died on February 28, 1954 (R. 129), prior to the adoption of the 1954 Code, the tax liability of her estate is determined under the provisions of the Internal Revenue Code of 1939 and its pertinent Regulations. Section 7851(a) (2)(A), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 7851). Section 812(b) of the 1939 Code (26 U.S.C. 1952 ed., Sec. 812) authorizes the deduction for legal fees sought by the taxpayer in this case and no issue is raised here on that substantive question. If, however, the deduction was not claimed in the original tax return, a claim for refund based upon such expenses, as with all other claims, must have been filed "three years next after the payment of such tax." Section 910, Internal Revenue Code of 1939 (Appendix A, *infra*). Since the estate's tax return was filed and its tax was paid on May 19, 1955 (R. 95), and the present claim was not filed until May 1, 1961 (R. 97), an unrestrained application of the statute of limitations would bar the present claim outright. However, in light of the difficulty a taxpayer may experience in anticipating at

the time a refund claim is made whether its claim will be denied, the Regulations under the 1939 Code set forth the following conditions for asserting a claim based on this special category of attorneys' fees (Treasury Regulations 105 (1939 Code), Section 81.34 (Appendix A, *infra*)):

A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted. A deduction for such fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.³

The regulation was interpreted in *Bohnen v. Harrison*, 232 F. 2d 406 (C.A. 7th 1956), to permit assertion of a refund claim based upon attorneys' fees incurred in prosecuting a substantive claim for refund for the first time in the course of the substantive refund litigation, irrespective of whether the attorneys' fees deduction was made a part of the original claim filed with the Commissioner of Internal Revenue. This construction of the regulation was codified in the Regulations under the 1954 Code with the addition of the following sentence as part of Section 20.2053-3(c)(2), Treasury Regulations on Income Tax (1954 Code) (Appendix A, *infra*), to the

³ The above-quoted language was added to Section 81.34 of Treasury Regulations 105 (1939 Code), by T.D. 5596, 1948-1 Cum. Bull. 127.

language already appearing in the earlier regulation and repeated in the new regulation:

A deduction for reasonable attorneys' fees actually paid in contesting an asserted deficiency or in prosecuting a claim for refund will be allowed even though the deduction, as such, was not claimed in the estate tax return or in the claim for refund.

It is against the liberality of Section 81.34 that the course followed by the taxpayer must be tested. Taxpayer, although informed by the regulation that the deduction should be claimed when the refund claim is prosecuted, that it would not be questioned because of the uncertainty of the amount, and that it need not be first asserted in a claim filed with the Commissioner, nevertheless let the entire substantive refund proceeding terminate before initiating its claim for the deduction based on attorneys' fees. In circumstances almost identical to the present case, the court in *Frank v. Granger*, 145 F. Supp. 370, 373 (W.D. Pa. 1956), stated:

* * * the steps which the law says petitioner shall take to secure a deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund are a prerequisite to granting relief. The claim cannot be made afterward, at the latest it must be made during the time the refund claim is prosecuted. In this case, the adjudication was filed, the judgment then entered, an appeal taken, the appeal dismissed, and the Government paid the refund, with interest. Nevertheless, petitioners seek an

additional refund. The claim for such additional refund was not timely made.

Unless the regulation itself is invalid and the claim is not otherwise barred by the statute of limitations, taxpayer has shown no excuse or justification for ignoring the regulation, indeed if any could be shown. Insofar as the validity of the regulation is concerned, no issue regarding it was raised below and none was suggested by the District Court in its findings and conclusions.⁴ The District Court's holding, although not fully articulated, appears to rest upon its conclusion that "The right to said deduction did not arise and the estate tax paid by plaintiff was thus not overpaid until the amounts of said extraordinary fees and costs were determined and allowed by the probate court on June 30, 1960." (R. 98.) The court followed this conclusion with the unadorned assertion that the claim was timely filed and not barred by the statute of limitations. (*Ibid.*) Section 910 of the 1939 Code, however, states without qualification that claims first asserted more than three years after the tax was paid shall be barred. No exception is made for claims not known or which "did not arise" (R. 98) within the three-year period. In that respect the statute strikes a balance between the allowance of claims for a period of time thought fair and sufficient by Congress—a time period not changed upon reenactment of the Code in 1954—and the administrative

⁴ The regulation was entirely ignored by the District Court; it is nowhere mentioned or alluded to in the findings and conclusions below. (R. 94-98.)

need of taxpayers and the Commissioner to close cases. Where Congress is apprehensive that a certain category of claims may not be known within the applicable period of limitations and it wishes these claims to be allowed, it has enacted a statutory extension of the limitation period for that category of claims. See, e.g., Sections 2014(e), 2015, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 2014, 2015).

If the issue is determined only by reference to Section 910, as the District Court treated the case, and not with regard to Section 81.34 of the Regulations, there can be no question of the untimeliness of the claim. We think, however, that the District Court erred in its major premise, i.e., its holding as to when taxpayer's right to claim the deduction arose. Taxpayer had a right to claim a deduction for attorneys' fees incurred, or to be incurred, in prosecuting its substantive claim. The right to do so is made clear by Section 81.34, which directs that the claim be made at the time the substantive claim is asserted, and which permits it to be made in an indeterminate amount and without formal filing with the Commissioner. Thus from May 16, 1957, when taxpayer filed its first refund claim (R. 95), until at least September 8, 1959, when judgment was rendered in taxpayer's refund suit (R. 96), it was open to taxpayer to assert an estimated deduction for attorneys' fees incurred in prosecuting the claim.

Having failed to make the claim within the time prescribed by the regulation, taxpayer is, independ-

ently of the regulation, clearly barred by the statute of limitations. Moreover, the regulation may not be read as a waiver of the statute of limitations, thus extending indefinitely the time within which this category of claims may be asserted. The Commissioner is not empowered, except as expressly provided by statute, to waive the statute of limitations for a single claim or a category of claims. *United States v. Garbutt Oil Co.*, 302 U.S. 528, 534 (1938); see *Tucker v. Alexander*, 275 U.S. 228, 231-232 (1927). The regulation, however, is predicated on the timely filing of a preceding substantive refund claim, the claim which generates the expenses for which an estate tax deduction is sought. The ancillary claim thus draws its life from the timely substantive claim. The effect of the regulation is to imply an inchoate claim for deduction based on attorneys' fees which may be brought to fruition by the taxpayer in the course of the refund proceedings or which abates upon termination of the refund proceeding if no formal claim is made. The actual claim for the deduction, if not made simultaneously with the original claim, is thus treated as an amendment to the original claim. As such, the Commissioner has authority to allow it and to set a time limit for its filing. See *United States v. Kales*, 314 U.S. 186, 193 (1941).⁵

⁵ There is no inconsistency between this view and the position taken by the Commissioner in *Rogan v. Taylor*, 136 F. 2d 598 (C.A. 9th 1943). There the Commissioner denied a claim for an administration expense deduction, which apparently included attorneys' fees incurred in refund litigation, on the ground that when the claim for

In relating the time period for claiming deductions for attorneys fees incurred in refund litigation to the refund litigation itself, the regulation is in the nature of a codification of the doctrine of *res judicata* as it applies to refund suits. Prior to promulgation of the amended regulation, it was the Commissioner's practice to reject claims based on this category of attorneys' fees when made for the first time after the entry of judgment in refund litigation on the ground that the doctrine of *res judicata* required that all of the taxpayer's claims be asserted in a single cause of action. The Court of Appeals were sharply split on the validity of this position. Compare *Cleveland v. Higgins*, 148 F. 2d 722 (C.A. 2d 1945), and *Van Dyke v. Kahl*, 171 F. 2d 187 (C.A. 7th 1948), with *Magruder v. Safe Deposit and Trust Co.*, 159 F. 2d 913 (C.A. 4th 1947), and *Martin v. Broderick*, 177 F. 2d 886 (C.A. 10th 1949). In each case there was no question of the timeliness of the claims involved; the only issue was whether the taxpayer had a right to claim estimated attorneys' fees before the

deduction was first asserted prior to expiration of the statute of limitations it (p. 602) "did not refer to any then existing right to refund." The amendment to Section 81.34 in 1947 (T.D. 5596, 1948-1 Cum. Bull. 127), subsequent to the *Rogan* decision, plainly established the "existing right to refund" which might not have existed prior to the amendment. This Court in *Rogan* agreed with the Commissioner's position that no right to claim the refund existed at the time the claim was made, but added (136 F. 2d p. 602): "We do not mean to say that a present claim may not be predicated upon a present estimate of future expenses, a question not now before us."

first judgment was entered, a right of a character that would have barred its post-judgment assertion because it could have been, but was not, included in the first cause of action. The difficulty arose from the failure of the Regulations to state that a taxpayer could claim estimated expenses in an uncertain amount prior to entry of judgment in the first suit. Thus the courts in the *Magruder* and *Martin* cases, *supra*, held that no right to make such a claim existed until judgment was entered in the substantive refund litigation and the amounts of fees became known with certainty. Since under the amended regulation the taxpayer is both permitted and required to make the estimated claim, the earlier view of some of the courts that *res judicata* was inapplicable is no longer pertinent.⁶

Taxpayer's substantive refund claim and its first refund suit were filed within three years after pay-

⁶ In *Martin v. Broderick*, *supra*, the court considered the amendment to Section 81.34, although the case developed prior to the amendment, and stated (177 F. 2d, p. 888):

It may be that the Treasury Department is authorized by regulation to require a taxpayer to include in his claim for refund an estimated amount of the attorneys' fees he expects to claim against the estate, at the risk of being barred to later assert it.

The court added that the regulation "need not necessarily rest upon the doctrine of *res judicata*" (*ibid*) in the sense that the new regulation did not invoke a pre-existing but unarticulated doctrine which independently of the regulation would bar the claim before the court in that case. We think the regulation does embody the doctrine of *res judicata*, but in a way that fairly informs taxpayers of when the claims must be made.

ment of the tax against which its present claim is asserted. Thus we need not deal with the applicability of the statute of limitations to claims based upon attorneys' fees which are made simultaneously with the substantive refund claim, and within the terms of the regulation, but which are made more than three years after payment of the tax. In such cases the timeliness of the substantive claim with respect to payment of a deficiency cannot, without a distortion of the statute of limitations, render as timely with respect to the original payment of the tax a claim based on attorneys' fees. The difficulty of this circumstance has led one court to conclude that the statute of limitations does not apply at all to claims in that category. *Duncan v. United States*, 148 F. Supp. 264 (Mass. 1957). In *Duncan*, unlike the present case, the taxpayer did all he had to do to qualify under the regulation. Since the present taxpayer has not followed the simple course set forth in the regulation and, again unlike the taxpayer in *Duncan*, did file its first refund claim within three years after payment of the original tax, this Court need not consider the unsupported assertion of the court in *Duncan* that the statute of limitations does not apply to the class of claims there considered.

The filing of a timely refund claim is a prerequisite to federal jurisdiction to entertain a refund suit based upon the claim. *Noland v. Westover*, 172 F. 2d 614 (C.A. 9th 1949), certiorari denied, 337 U.S. 938; *Rogan v. Ferry*, 154 F. 2d 974 (C.A. 9th 1946). Since taxpayer's claim was not timely filed or otherwise as-

serted as required by law, its suit should have been dismissed below.

CONCLUSION

The judgment of the District Court should be reversed and the case dismissed.

Respectfully submitted,

RICHARD C. PUGH,
Acting Assistant Attorney General.

LEE A. JACKSON,
DAVID O. WALTER,
LOUIS M. KAUDER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

Of Counsel:

CECIL F. POOLE,
United States Attorney.

July, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: day of July, 1967.

LOUIS M. KAUDER
Attorney

APPENDIX A

Internal Revenue Code of 1939:

SEC. 910. PERIOD OF LIMITATION FOR FILING CLAIMS.

All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund.

(26 U.S.C. 1952 ed., Sec. 910.)

SEC. 3791. RULES AND REGULATIONS.

(a) *Authorization.*—

(1) *In general.*—Except as provided in section 1928(a), Cotton Futures, section 2599, Marihuana, section 2559, Narcotics, section 3176, Liquor, and section 1805, Silver, the Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

* * *

(26 U.S.C. 1952 ed., Sec. 3791.)

Internal Revenue Code of 1954:

SEC. 6081. EXTENSION OF TIME FOR FILING RETURNS.

(a) *General Rule.*—The Secretary or his delegate may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by this title or by regulations. Except in the case of taxpayers who are abroad, no such extension shall be for more than 6 months.

* * * *

(26 U.S.C. 1964 ed., Sec. 6081.)

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * *

(26 U.S.C. 1964 ed., Sec. 7422.)

Treasury Regulations 105 (1939 Code) :

§ 81.34 [as amended by T.D. 5596, 1948-1 Cum. Bull. 127]

Attorney's fees.—The executor or administrator, in filing the return, may deduct such an amount of attorney's fees as has actually been paid, or in an amount which at the time of such filing it is reasonably expected will be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will, nevertheless, be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the deduction is disallowed in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require.

A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted. A deduction for such fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.

Attorney's fees incurred by beneficiaries incident to litigation as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are properly

charged against the beneficiaries personally and are not administration expenses.

Treasury Regulations on Estate Tax (1954 Code) :

§ 20.2053-3 *Deduction for expenses of administering estate.*

* * * *

(c) *Attorney's fees.*

* * * *

(2) A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time the deficiency is contested or the refund claim is prosecuted. A deduction for reasonable attorney's fees actually paid in contesting an asserted deficiency or in prosecuting a claim for refund will be allowed even though the deduction, as such, was not claimed in the estate tax return or in the claim for refund. A deduction for these fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.

* * * *

(26 C.F.R., Sec. 20.2053-3.)

APPENDIX B

Table of Exhibits pursuant to Rule 18(2)(f) as amended (page citations are to the trial transcript):

<u>Plaintiff's Exhibits</u>	<u>Identified</u>	<u>Admitted</u>
1	6	8
2	7	8
3	8	9
4	(omitted)	9
5	10	11